STATEMENT OF MICHAEL H. GOTTESMAN
PROFESSOR OF LAW
GEORGETOWN UNIVERSITY LAW CENTER

Before the

SENATE COMMITTEE ON
HEALTH, EDUCATION, LABOR & PENSIONS

Concerning Recent Supreme Court Decisions
Affecting Congress= Ability to Redress Employment Discrimination

APRIL 4, 2001

Mr. Chairman and Members of the Committee:

I am a professor of law at Georgetown University Law Center. Much of my scholarship focuses on issues of constitutional law, especially Constitution=s allocation of power between the federal government and the states. Perhaps because of that expertise, I was enlisted to represent the plaintiffs, Patricia Garrett and Milton Ash, in the case in which the Supreme Court recently struck down as unconstitutional, by a 5-4 vote, a part of the Americans with Disabilities Act (ADA). ***University of Alabama-Birmingham v. Garrett, No. 99-1240*** (decided Feb. 21, 2001).

Garrett is the latest in a series of decisions in which a five-person majority on the present Court has struck down, one after another, a number of congressional statutes attempting to protect citizens against wrongdoing by state officials. In the past six years, the Court, in most instances by a 5-4 vote, has declared nearly thirty federal statutes to be unconstitutional in whole or in part, a rate of roughly five per year. By contrast, in the entire 200-year history of the Nation before that, the Court had struck down only 129 statutes, an average of one statute every two years. The data appears in Seth Waxman, Defending Congress, 79 N.C.L.Rev. 101 (2001).

I want to focus today on just two of the doctrines the Court has used to achieve these results -- an expanded reading of the immunity accorded states by the Eleventh Amendment, and a contracted reading of the powers conferred on Congress by the Fourteenth Amendment. It is these two doctrines that led the Court to invalidate the private damage suit provisions of the Age Discrimination in Employment Act and the ADA, as well as of other statutes. These decisions are not manifestations of traditional divides between liberals and conservatives, or Democrats and Republicans. Rather, these decisions -- which represent a degree of judicial activism that is unprecedented, and abandon traditional understandings of the meaning of our Constitution articulated in prior Supreme Court decisions -- position the Court=s present majority outside the mainstream of contemporary American thought about the relationship between federal and state governments.

This is, I grant, a harsh assessment. But let me cite just two recent examples to show that it is accurate. In the ***Garrett*** case, the Court struck down a provision of the ADA that was approved in the Senate by a vote of 91-6, and in the House by a vote of 377-28. This provision was signed into law by President George H.W. Bush, who declared it one of the landmark civil rights laws in our country=s history, one that would bring us Acloser to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty and the pursuit of happiness.@

Title I of the ADA imposed duties upon states (as well as on all other employers in America) to stop discriminating against persons with disabilities, and authorized private-party lawsuits as a means to enforce those duties. Although this legislation subjected States to damages actions by employees claiming disability discrimination, the States did not oppose any part of the ADA. Quite the contrary, the bill that became the ADA was vigorously supported by the National Association of Attorneys General and other national organizations of state officials.

The ***Garrett*** case came to the Court a decade after the ADA=s passage, but nothing had happened in the interim to diminish the broad enthusiasm for the statute, including for its provisions regulating the states and authorizing private suits to enforce and for damages. Former President Bush filed an amicus brief in the Supreme Court urging the Court to uphold the challenged provision of the ADA. (To my knowledge, this is the first time in our Nation=s history that an ex-President felt so strongly about a bill he had signed as to file a brief in the Supreme Court defending it.) Similarly, those in both parties who had championed the ADA at the time of its enactment filed an amicus brief urging that the Court uphold the provision. (This brief was filed by, among others, Senators Dole, Hatch, Jeffords, Kennedy and Harkin).

Nor had there been any broad defection by states in the decade since the ADA=s passage. Although states were now finding themselves defendants in numerous private suits seeking damages for violating the ADA, and although Alabama urged all the states to join in an amicus brief supporting its effort to invalidate the ADA=s authorization of private-party

suits, only seven states answered Alabama=s call. Remarkably, twice as many states responded by filing an amicus brief urging the Court to ***uphold*** the provision that subjected them to these suits. This brief advised the Court that the problems of disability discrimination by individual state actors remained real, that state laws were inadequate to solve the problem, and that states were willing to suffer these damage suits in order to assure that the public interest in ending discrimination against persons with disabilities is vindicated.

Other recent decisions in which the Court=s five person majority has struck down federal legislation have similarly lacked any significant constituency within our Nation. For example, in ***Morrison v US***, the Court struck down an important provision of the Violence Against Women=s Act, which had been enacted by Congress with the votes of huge majorities in both parties. That triumph for Astate=s rights@ was achieved although thirty-seven states had joined in an amicus brief urging the Court to ***uphold*** the provision, and only one state had filed a brief urging the result the Court reached. A similar story can be told about other congressional statutes that have been declared unconstitutional as applied to the states, among them the Age Discrimination in Employment Act, the Religious Freedom Restoration Act, and the Patent Remedy Act.

The five-person majority on the Court has achieved these results by ignoring well-established Supreme Court precedents; by ignoring (as it admits) the plain language of the Constitution in favor of a vision of the states as Aequal sovereigns@ (a vision that ignores the Constitution=s Supremacy Clause); and by discarding the tradition of deference to the fact-finding and policy judgments of Congress, a deference that previously had been a hallmark of the Court=s approach to assessing the constitutionality of federal statutes.

I will briefly describe the two 180-degree turns in the Court=s jurisprudence that led to the invalidation of the ADA=s private-suit provision in Garrett, and will attach to this testimony extended excerpts from an article I wrote recently (before Garrett was decided) that traces in

more detail the dramatic alteration in our constitutional jurisprudence these recent decisions have wrought.

Eleventh Amendment. The Eleventh Amendment provides that: AThe Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States ***by Citizens of another State, or by Citizens or Subjects of any Foreign State.@*** As is evident from its wording, the Eleventh Amendment does not purport to deprive the federal courts of jurisdiction to entertain suits against states ***brought by their own citizens***. This is not an accident. It reflects the limited purpose the Eleventh Amendment was adopted to serve.

The Eleventh Amendment was added to the Constitution to overturn one of the Supreme Court=s earliest decisions, ***Chisholm v Georgia***, 2 US 419 (1793). ***Chisholm*** held that the Adiversity of citizenship@ clause in Article III of the Constitution conferred jurisdiction on federal courts to adjudicate claims brought by non-citizens alleging that a state had violated ***state law***. Justice Iredell, who dissented in ***Chisholm,*** argued that this was error -- that the diversity of citizenship clause should not be construed to deprive states of their traditional immunity when sued ***under state law***. But even Justice Iredell conceded that the federal courts had jurisdiction over suits against states seeking to enforce ***federal law***; that followed logically from the fact that the Constitution contained a Supremacy Clause declaring federal law to be supreme and binding on the states.

The Eleventh Amedment was designed to incorporate into the Constitution the vision expressed in ***Chisholm*** by Justice Iredell. That is why it is worded as it is. True to the literal language and the clear purpose of the Eleventh Amendment, the Supreme Court had held, prior to enactment of the ADA, that the Eleventh Amendment is no bar to Congress= creating private causes of action against states to enforce the obligations imposed upon states ***by federal statutes***. ***Pennsylvania v Union Gas Co.***, 491 US 1 (1989). But six years after enactment of the ADA, the new five-person majority on the Court overruled ***Union Gas***, in ***Seminole Tribe v Florida***, 517 US 44 (1996), and held that, except for statutes enacted by Congress in the exercise of its power to enforce the Fourteenth Amendment,

the Eleventh Amendment denies Congress any power to create private causes of action against states.

The ***Seminole Tribe*** majority conceded that its ruling was contrary to the language of the Eleventh Amendment. As it acknowledged, Athe text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts.@ 517 US at 54. Nonetheless, the Court ruled that the Amendment also restricted the ***federal question*** jurisdiction of the federal courts, because A[i]t is inherent in the nature of [state] sovereignty not to be amenable to the suit of an individual without [the state=s] consent.@ ***Id***. at 54. The Court made no effort to square this reasoning with the Constitution=s Supremacy Clause, which clearly declares that states are not Asovereign@ when Congress has enacted a federal law.

Just how far from the mainstream the Court=s ***Seminole Tribe*** decision wanders can be discerned from the reaction of Justice John Paul Stevens -- who was appointed to the Court by President Gerald Ford, and who is not by nature given to hyperbolic diatribes. Traditionally, Justices who dissent from a decision (as Justice Stevens had in ***Seminole Tribe,*** nonetheless will accept it as controlling precedent, and apply it in future cases despite their misgivings. When the challenge to the Age Discrimination in Employment Act was before the Court in ***Kimel***, Justice Stevens explained why he could not follow that traditional course:

> I remain convinced that ***Union Gas*** was correctly decided and that the decision of five Justices in ***Seminole Tribe*** to overrule that case was profoundly misguided. Despite my respect for ***stare decisis***, I am unwilling to accept ***Seminole Tribe*** as controlling precedent... [B]y its own repeated overruling of earlier precedent, the majority has itself discounted the importance of ***stare decisis*** in this area of the law. The kind of judicial activism manifested in cases like ***Seminole Tribe***... represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.

Justice Stevens= assessment is shared by the virtually unanimous scholarly literature tracing the history of the Eleventh Amendment and its limited purpose. These articles are cited in my attached article.

Fourteenth Amendment. As noted above, the ***Seminole Tribe*** majority allowed an exception for statutes enacted by Congress pursuant to its power to enforce the Fourteenth Amendment. Congress could create private causes of action to enforce the Fourteenth Amendment because the Fourteenth Amendment was enacted long after the Eleventh, and expressly empowered Congress to enact statutes enforcing it.

But in recent decisions that same five-person majority has dramatically narrowed the understanding of what Congress= Fourteenth Amendment power encompasses. It has achieved that narrowing by two devices working in tandem:

(1) First, the five-person majority has reconstrued the Fourteenth Amendment substantively, so that it affords less protection against discrimination than previous Court decisions had provided. This narrowing process reached its climax (so far, at least) in ***Garrett***, where the Court declared that actions taken by states that intentionally discriminate against persons with disabilities, and that are motivated solely by prejudice and aversion toward such persons, are not violations of the Equal Protection Clause, so long as some Arational@ basis for taking that action can be imagined, and even though it is clear that the action was not motivated by that Arational@ consideration but instead by irrational animus. The Court declared in ***Garrett*** that a classification disqualifying persons with disabilities is constitutional unless the challenging party can carry the burden of Anegativ[ing] any reasonably ***conceivable*** state of facts that ***could*** provide a rational basis for the classification.@ That an action was taken solely out of animus toward persons with disabilities Adoes not a constitutional violation make.@ As the four dissenters explained, prior Supreme Court decisions (including a decision finding a denial of equal protection against persons with disabilities) had held that the Equal Protection Clause invalidates Adiscrimination that rests solely upon ›negative attitude[s],= ›fea[r],= ... or ›irrational prejudice,@ [citing prior cases].

(2) Second, the five-person majority has abandoned entirely the deference to congressional fact-finding, and to the congressional determination of what steps are necessary to vindicate Fourteenth Amendment rights, and has imposed its own judgments about these matters in substitution for those of our elected representatives. This has been clear in several recent decisions, but nowhere more dramatically than in ***Garrett***, where the Court dismissed out of hand Congress= express findings of rampant discrimination against persons with disabilities, and mocked the massive evidentiary record Congress had compiled in arriving at those findings. As the dissenters noted, the majority had Areview[ed] the congressional record as if it were an administrative agency record.@ This is in stark contrast to the Court=s traditional approach, spelled out in decisions that are quoted extensively in the attached article.

I have attached a more detailed description of the evolution in the Court=s approach to the Eleventh Amendment, and to Congress= power to enforce the Fourteenth Amendment. The attachment is an excerpt from an article that I wrote prior to the Court=s recent decision in ***Garrett***, which is to appear shortly in the Ohio State Law Journal.

In closing, I wish to emphasize that the two doctrinal issues I have described in this testimony are only a part of a larger arsenal with which the Court=s present majority is eviscerating, in the name of Astates= rights,@ Congress= ability to legislate. These five Justices have also narrowed the traditional understanding of Congress= powers under the Commerce Clause, and have invented an entirely new doctrine that prevents Congress from imposing any affirmative obligations on states. On these issues, as on the ones I have discussed, the agenda of the Court=s majority lacks any significant constituency in our Nation. Neither party in Congress holds the views (or seeks the ends) espoused in these decisions. And the states have shown no interest in enjoying the new-found Arights@ that the Court=s majority is so eager to bestow upon them.

The Court=s recent decisions in these cases imperil numerous other federal statutes enacted with bipartisan majorities, many of them aimed at preventing employment discrimination. For example, the logic of the five-

person majority, and the rigor with which it has shown itself willing to enforce that logic, place in jeopardy the disparate impact provisions of Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, Title II of the ADA, the Fair Housing Act, and many other civil rights statutes. Cases are pending on certiorari today that may provide the Court the opportunity to apply its new jurisprudence to many of these statutes.

[Attachment to Statement of Michael H. Gottesman]

[This Article Will Appear Shortly in the Ohio State Law Journal]

Disability, Federalism, and a Court with an Eccentric Mission

MICHAEL H. GOTTESMAN*

This Article examines the Supreme Court=s recent Eleventh and Fourteenth Amendment decisions constraining Congress=s power to impose legal obligations on state governments. The context for this examination is the Court=s current consideration of the constitutionality of the provision of the Americans with Disabilities Act authorizing individual suits against states by persons alleging they have been victimized by state disability discrimination.

I. INTRODUCTION

A. *The Consensus that Supported the Enactment of the ADA*

There are occasions in the public life of the nation when the evidence of pervasive public and private oppression of a group of citizens is so plain and so compelling that a consensus emerges for a national response in the form of a comprehensive federal legislative remedyCa consensus that knows no partisan political conflict,

---

* PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER. THE AUTHOR IS ONE OF THE COUNSEL FOR THE RESPONDENTS IN THE SUPREME COURT IN *UNIVERSITY OF ALABAMA BOARD OF TRUSTEES V. GARRETT,* NO. 99-1240 (U.S. FILED _____), AND PRESENTED ORAL ARGUMENT ON THEIR BEHALF TO THE SUPREME COURT ON OCTOBER 11, 2000. THE AUTHOR WISHES TO THANK HIS CO-COUNSEL IN *GARRETT* WITH WHOM THE ISSUES DISCUSSED IN THIS ARTICLE HAVE BEEN AIRED AT LENGTH: IRA BURNIM, MARY GILIBERTI, LAURENCE GOLD, JENNIFER MATHIS, DEBORAH MATTISON, ARLENE MAYERSON, AND SANDRA REISS. THE AUTHOR ALSO WISHES TO THANK THE FOLLOWING FOR THEIR INVALUABLE RESEARCH ASSISTANCE: ANNE-MARIE CARSTENS, JULIE LEHRMAN, MICHAEL TRONCOSO, AND JOSHUA VITULLO.

no ideological disagreement, and no federal / state divide. The enactment of the Americans with Disabilities Act (ADA) in 1990 was such an occasion.[1]

[1] 42 U.S.C. ' ' 12101B12213 (1994).

The ADA grew out of more than twenty years of hearings and investigations into the deplorable public- and private-sector treatment of persons with disabilities and their consequent deplorable situation.[2] Those hearings and investigations led to the introduction of a broadly-sponsored legislative response; two years of fine-tuning in committee and floor deliberations eventuating in a final bill that was the product of A[c]ompromise, carefully crafted and painstakingly wrought;@[3] and passage of the final bill by 91-6 in the United States Senate and 377-28 in the United States House of Representatives.[4]

As the legislation moved forward, it was championed by federal and state authorities alike. The Bush Administration supported its passage, as did leaders of both parties in Congress,[5] the National Association of Attorneys General, the National Association of Counties, the National Association of State Mental Retardation Program Directors, and many private groups and associations.[6] The ADA marshalled this unity of action for the most compelling of reasons, as President Bush stated in signing the ADA into law:

> [T]ragically, for too many Americans, the blessings of liberty have been limited or even denied. The Civil Rights Act of ›64 took a bold step towards righting that wrong. But the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today=s legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness.[7]

---

2 With respect to the ADA alone, Congress held eighteen hearings, sixty-three field hearings, considered innumerable studies and reports evaluating the discriminatory treatment of persons with disabilities and the reasons therefor, issued five committee reports, and engaged in prolonged floor debate. Timothy Cook, *The Americans with Disabilities Act: The Move to Integration,* 64 TEMPLE L. REV. 393, 393, 414 (1991). The ADA deliberations, moreover, rested on the institutional knowledge and expertise Congress had gained in considering and enacting prior statutes addressing discrimination on the basis of disability. Lowell P. Weiker, Jr., *Historical Background of the Americans with Disabilities Act,* 64 TEMPLE L. REV. 387, 387B89 (1991).

3 135 CONG. REC. 19,800 (1989) (statement of Sen. Harkin). *See also* 135 CONG. REC. 19,804 (1989) (statement of Sen. Hatch) (discussing the compromise that resulted in the ADA).

4 136 CONG. REC. 17,375B76 (1990) (Senate approval of the Conference Committee Report); 136 CONG. REC. 17,296B97 (1990) (House approval of the Conference Committee Report).

5 *See* 135 CONG. REC. 19,804 (1989) (statement of Sen. Hatch); 135 CONG. REC. 19,806B07 (1989) (statement of Sen. Kennedy); 135 CONG. REC. 19,889 (1989) (statement of Sen. Dole); 135 CONG. REC. 19,798 (1989) (statement of Sen. Harkin).

6 135 CONG. REC. 19,799 (1989). In addition, the fifty Governors=Committees advised Congress that state laws were inadequate to deal with the problem. *See infra* page ___. There was no opposition to the bill from the States.

7 Remarks by the President during the Ceremony for the Signing of the Americans with Disabilities Act of 1990, *in* THE LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT, at 845 (G. John Tysse ed., LRP Publications 1991) (1990).

While the ADA applies to much more than employment, this Article focuses on the provisions of the ADA banning employment discrimination. Title I of the ADA forbids disability-based discrimination in employment. In addition to actions motivated by negative animus, Adiscrimination@ is defined to include a number of practices without regard to motivation, including the failure to make reasonable accommodation (if it can be provided without undue hardship) to the known physical and mental limitations of an otherwise qualified employee.[8] Title I applies to both private employers and state and local government employers.[9]

8 42 U.S.C. ' 12112(a) (1994) (prohibiting discrimination); ' 12112(b) (giving several different definitions of Adiscriminate@).

9 42 U.S.C. ' 12111(5) (1994) (defining Aemployer@).

Title II of the ADA applies only to state and local governments.[10] It forbids discrimination with respect to programs, services, and activities, and thus ranges far beyond employment.[11] There is a circuit conflict as to whether Title II applies to employment.[12] The Eleventh Circuit, which decided the case now before the Supreme Court, has held that it does.[13] This position is also held by the Attorney General, who is charged with administering Title II.[14] If that is correct, Titles I and II overlap, to the extent that they both forbid employment discrimination by public employers. The Attorney General has issued a regulation declaring that, insofar as the titles overlap (i.e., with respect to public employment), Title II=s substantive provisions are to be interpreted in the same way as Title I=s substantive provisions.[15] This does not render Title II superfluous, for it provides somewhat more generous remedies to a victim of discrimination than are available under Title I.[16]

B. *The Present Peril of a Part of the ADA*

Despite the unanimity of support, the fate of a part of the ADA is now in immediate peril. The Supreme Court will decide this Term, in *University of Alabama Board of Trustees v. Garrett,*[17] whether Congress exceeded its constitutional powers by authorizing individuals to sue states alleging that the latter have violated the ADA. This current jeopardy does not reflect a collapse of support for the ADA in the decade since its passage. Quite the contrary, the major players in the enactment of the ADA all have filed amicus curiae briefs with the Court in *Garrett* urging that the challenged provision

---

10 42 U.S.C. ' 12131(1) (1994).

11 42 U.S.C. ' 12132 (1994) (prohibiting discrimination by any Apublic entity@).

12 *Compare* Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 820 (11th Cir.), *cert. denied,* 525 U.S. 826 (1998) (holding that title II does apply to employment) *with* Zimmerman v. Or. Dep=t of Justice, 170 F.3d 1169, 1174 (9th Cir. 1999) (holding that title II does not apply to employment).

13 Bd. of Trustees of Univ. of Ala. Birmingham v. Garrett, 193 F.3d 1214, 1216 (11th Cir. 1999).

14 28 C.F.R. ' 35.140. *See also* Section-by-Section Analysis, 28 C.F.R. Part 35, App. A, ' 35.140.

15 28 C.F.R. ' 35.140 (1999). *See also* 28 C.F.R. ' 35.140 app. A at 491 (1999).

16 Title I declares that it is to be enforced pursuant to the remedial scheme applicable to Title VII of the Civil Rights Act of 1964. 42 U.S.C. ' 12117(a) (1994). This means that compensatory damages and punitive damages are capped at a combined total of $50,000 to $300,000, depending on the size of the employer. 4 U.S.C. ' 1981a(b)(3) (1994). Title II is enforced pursuant to the remedial scheme of Title VI of the Civil Rights Act of 1964 under which there is no cap on the amount of compensatory or punitive damages. *See id.* ' 42 U.S.C. 12133 (1994); Olmstead v. L.C., 527 U.S. 581, 590 n.4 (1999).

17 University of Alabama Board of Trustees v. Garrett, No. 99-1240 (U.S. filed _____), *cert. granted,* ____ (date) (No.).

be upheld. Former President Bush filed one such brief, and the managers of the ADA in Congress (Senators Hatch, Dole, Kennedy and Harkin, and Representatives Bartlett and Hoyer) filed another. Indeed, of the twenty-one states registering their views in amicus curiae briefs, two-thirds ask the Court to uphold the provision subjecting them to suits by complaining individuals.[18]

[18] The Attorney General of Hawaii prepared an amicus curiae brief supporting Alabama=s quest to strike down the individual-suit provision of the ADA. A draft of that brief was circulated to the Attorneys General of all the states with invitations to join. Only six other states accepted the invitation: Arkansas, Idaho, Nebraska, Nevada, Ohio, and Tennessee. The Attorney General of Minnesota thereupon prepared an amicus curiae brief supporting the respondents= quest to *uphold* the individual-suit provision, which was joined by thirteen other states: Arizona, Connecticut, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Missouri, New Mexico, New York, North Dakota, Vermont, and Washington. Twenty-eight states joined neither brief, suggesting implicitly that they are content with (even if not ecstatic about) the ADA=s provision. Otherwise, their economic self-interest should have prompted their joining Hawaii=s brief.

The peril comes not from a loss of public support for the ADA, but from the territory staked out in recent decisions by a bare five-person majority of the current Supreme Court, which has pursued an eccentric mission of attempting to reinvigorate state Asovereignty@ that appears to have no constituency in contemporary society. There is reason to doubt that the consensus in the outside world supporting the challenged ADA provision will have much influence on these Justices. Just a few months ago, these five Justices struck down a part of the Violence Against Women Act (VAWA)[19] despite a similar consensus in Congress and a line-up of states in amicus briefs 35-1 in favor of upholding the challenged provision.[20]

Here is the root of the problem: Congress, in enacting the ADA, claimed that it was exercising its powers under both the Commerce Clause[21] and Section Five of the Fourteenth Amendment.[22] At the time the ADA was enacted, the governing lawCstated in *PennsylVania v. Union Gas Co.,*[23] Cwas that Congress, when exercising its Article I legislative powers, may authorize private party suits against states to enforce the federal law. But the Supreme Court has since overruled *Union Gas,* five Justices holding, in *Seminole Tribe v. Florida,*[24] that Congress is precluded by the Eleventh Amendment from authorizing private-party suits against states, except when exercising its power, conferred in Section Five of the Fourteenth Amendment, to Aenforce, by appropriate legislation,@ that Amendment=s substantive provisions.[25] As long as this majority holds sway, it is not enough that Congress has power under the Commerce Clause to enact a statute regulating the states: that will not support the creation of a private right of action to enforce the statute.[26] Thus, the fate

---

19 United States v. Morrision, 120 S. Ct. 1740 (2000) (striking down part of the Violence Against Women Act, 42 U.S.C. ' 13981 (1994)).

20 *See* United States v. Morrison, 120 S. Ct. 1740, 1743 (Souter, J., dissenting).

21 U.S. CONST. art. I, ' 8, cl. 2.

22 *Id.* at amend. XIV, ' 5.

23 491 U.S. 1 (1989).

24 517 U.S. 44 (1996).

25 U.S. CONST. amend. XIV, ' 5.

26 Four members of the Court have stated that they do not accept, for *stare decisis* purposes, the holding in *Seminole Tribe* in judging the constitutionality of statutory provisions providing for the enforcement of valid federal law through private party suits against the States. *See, e.g.,* Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 650B54 (2000) (Stevens, J., dissenting) (to be published at 528 U.S. 62 (2000)). There is some possibility that new appointments to the Supreme Court would lead to the overturning of *Seminole Tribe*. Two of those in the current four-person minority were Republican appointeesCJustice Stevens appointed by President Ford, Justice Souter by President George H.W. Bush. Adherence to *Seminole Tribe* is unlikely to be a litmus test for future appointments, even in a Republican administration.

of the ADA (as of every federal statute that purports to authorize private suits against states) turns on whether the statute is a proper exercise of Congress=s power to enforce the Fourteenth AmendmentCthe one fount of congressional power that the Court=s current majority acknowledges entitles Congress to authorize private suits.

Here is the rub: this same five-person majority has an appetite for rejecting Congress=s invocations of its Fourteenth Amendment power. In the past three years, the Court has addressed the Fourteenth Amendment provenance of four federal statutes and found each wanting. The Court has invalidated the entire Religious Freedom Restoration Act (RFRA),[27] the provision of the Violence Against Women Act creating a federal cause of action by which victims of gender violence can recover damages from the perpetrators,[28] and the authorization of private-party suits against states under the Patent Remedy Act[29] and the Age Discrimination in Employment Act (ADEA).[30]

****

II. HOW WE GOT HERE: A BRIEF HISTORY OF THE COURT=S EVOLVING CONCEPTIONS OF THE ELEVENTH AMENDMENT AND OF CONGRESS=S POWER UNDER THE FOURTEENTH AMENDMENT

This Part traces the evolution of the Supreme Court=s interpretation of the Eleventh Amendment, and of the Court's conception of Congress=s power to enforce the Fourteenth Amendment. These are the necessary backdrops to understanding the issue posed in *Garrett.*

A. *The Eleventh Amendment*

---

27 City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act (RFRA), 42 U.S.C. ' 2000bbB2000bb-4 (1994), because Congress claimed power to enact RFRA only under the Fourteenth Amendment).

28 United States v. Morrison, 120 S. Ct. 1740 (2000) (to be published at 529 U.S. 598 (2000)) (striking down a provision of the Violence Against Women Act, 42 U.S.C. ' 13981 (1994), because the Court found the statute wanting under both the Commerce Clause and the Fourteenth Amendment).

29 Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (invalidating the authorization of private-party suits under the Patent Remedy Act, 35 U.S.C. ' 279(h), 296(a) (1994)).

30 Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (to be published at 528 U.S. 62) (invalidating the authorization of private-party suits in the Age Discrimination in Employment Act, 29 U.S.C. ' ' 621B634 (1994 and Supp. IV 1998)).

The Eleventh Amendment was adopted in 1798, in reaction to the Supreme Court=s decision in *Chisholm v. Georgia.*[31] The Court held in *Chisholm* that a South Carolina citizen could sue the State of Georgia in federal court, invoking diversity of citizenship jurisdiction, to enforce his *state-law* entitlement to payment by Georgia on bonds it had issued during the Revolutionary War.[32] Georgia would not have been susceptible to suit in state courts, as it enjoyed sovereign immunity there.[33]

The effect of the *Chisholm* holding was that the diversity jurisdiction of the federal courts subjected states to legal liability for breaching state-grounded substantive obligations that otherwise would have been unenforceable. The states were not amused, as many of them were obligated on war bonds they could not comfortably pay, and had been counting on their immunity from suit in state court to escape payment.[34] At the states= insistence, the Eleventh Amendment was promulgated by Congress and swiftly ratified by the states.

The Eleventh Amendment provides: AThe Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.@[35]

---

31 2 U.S. (2 Dall.) 419 (1793).

32 *Id.*

33 *See* Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1469B70 (1987).

34 *See* William Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction,* 35 STAN. L. REV. 1033, n.114 (1983); John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia *(1793),* 73 N.C. L. REV. 255, 257 (1994) (citing 4 Richard Hildreth, *The History of the United States of America* at 407B08 (rev. ed. 1856)).

35 U.S. CONST. amend. XI.

Historians and legal scholars have concluded, virtually unanimously, from the language, context, and Alegislative history@ of the Eleventh Amendment, that the Amendment was not intended to insulate states from federal court suits to enforce *federal* obligations.[36] Rather, its purpose was to remove federal jurisdiction over *state law* claims (from which states were immune in their own courts) and which were cognizable in federal court only because of the parties= diverse citizenship.[37] Justice Iredell, the lone dissenter in *Chisholm,* had conceded that the states, by ratifying the Constitution, had surrendered their sovereignty with respect to powers which that document conferred on the federal government, and accordingly the Supremacy Clause meant that Congress could confer federal court jurisdiction to entertain suits to enforce *federal* law against states.[38] Justice Iredell=s complaint was that there was no warrant for federal jurisdiction to subject states to *state law* obligations to which they had not consented.[39] The Eleventh Amendment was widely understood to have incorporated the line drawn by Justice Iredell.[40]

Chief Justice Marshall, writing for the Court in 1823 in *Cohens v. Virginia,*[41] ratified that understanding of the limited sweep of the Eleventh Amendment declaring that the Amendment had no effect on federal question suits and that Aa case arising under the constitution or laws of the United States is cogni[z]able in the Courts of the Union, whoever may be the parties to that case.@[42] The point of the Eleventh Amendment, he explained, was to bar jurisdiction in suits at common law by Revolutionary War debt creditors, not to Astrip the [federal] government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation.@[43]

---

36 In addition to the articles cited in Justice Souter=s dissent in *Seminole Tribe,* 517 U.S. 44, 111 n.8 (1996), the following articles reject the Eleventh Amendment=s application to federal question suits: Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity,* 75 NOTRE DAME L. REV. 953, 1000 (2000); Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia,* 75 NOTRE DAME L. REV. 859, 868B69 (2000); James E. Pfander, *History and State Suability: An AExplanatory@ Account of the Eleventh Amendment,* 83 CORNELL L. REV. 1269, 1351 (1998); Suzanna Sherry, *The Eleventh Amendment and Stare Decisis: Overruling* Hans v. Louisiana, 57 U. CHI. L. REV. 1260 (1990); William Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics,* 56 U. CHI. L. REV. 1261, 1263 (1989); H. Stephen Harris, Jr. & Michael P. Kenny, *Eleventh Amendment Jurisprudence After* Atascadero: *The Coming Clash with Antitrust, Copyright, and Other Causes of Action over Which the Federal Courts Have of Sovereignty and Federalism,* 96 YALE L.J. 1425, 1474B92 (1987); Keith Werhan, *Pullman Abstention After* Pennhurst: *A Comment on Judicial Federalism,* 27 WM. AND MARY L. REV. 449, 460 n.46 (1986); David L. Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case,* 98 HARV. L. REV. 61, 68 (1984); John Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation,* 83 COLUM. L. REV. 1889, 1893 (1983); William Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction,* 35 STAN. L. REV. 1033, 1034 (1983); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit upon the States,* 126 U. PA. L. REV. 1203 (1978).

There are three articles expressing Aminority@ views cited in Justice Souter=s famous footnote eight in *Seminole Tribe v. Florida,* 517 U.S. 44, 111 n.8 (1996) (Souter, J., dissenting), but two of these concede that *intra-state* federal question suits, i.e., those between a citizen of a state and that State, can be heard in federal court. *See* Lawrence Marshall, *Fighting the Words of the Eleventh Amendment,* 102 HARV. L. REV. 1342, 1367B71 (1989); Calvin R. Massey, *State Sovereignty and the Tenth and Eleventh Amendments,* 56 U. CHI. L. REV. 61, 66 (1989). Only the third Aminority@ article cited in Justice Souter=s footnote supports the holding in *Seminole Tribe*. William P. Marshall, *The Diversity Theory of the Eleventh Amendment: A Critical Evaluation,* 102 HAR. L. REV. 1372, 1382B83 (1989).

37 *See* William Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisidiction,* 35 STAN. L. REV. 1033, 1035, 1060 (1983) (AIn Chisholm, the Court held that this state-citizen diversity clause conferred jurisdiction to hear Chisholm=s damage action against Georgia and that the clause abrogated any sovereign immunity defense to the suit that Georgia might otherwise have had. The Eleventh Amendment was passed immediately thereafter in order to overturn this result. . . . The narrowness of the Amendment's coverage and its congruence with the affirmative authorization in Article III of state-citizen diversity jurisdiction suggest strongly that rather than intending to create a general sovereign immunity protection from all suits by private citizens, as the first proposal would have done, the drafters of the second and third proposals intended only to limit the scope of that part of Article III=s jurisdictional grant --- the-state-citizen diversity clause --- that had led to Chisholm.@).

38 *Chisholm,* 2 U.S. (2 Dall.) at 435B36.

39 *Id.* at 448B49.

40 *See supra* note **47** and accompanying text.

41 19 U.S. (6 Wheat.) 264 (1823).

42 *Id.* at 383.

43 *Id.* at 407.

Still, the Amendment=s infelicitous wording left room for future mischief. By its terms, the Amendment banned federal jurisdiction over *all* suits against states by out-of-staters, but over *no* suits against states by in-staters. That surely was not what the drafters intended, for it would have left in-staters free to invoke federal *subject matter* jurisdiction to enforce federal law against a state while denying that right to out-of-statersCa distinction that would not make sense. Sloppy drafting thus precluded a literal interpretation of the Amendment. Yet the wording of the Amendment, sloppy though it be, suggests that the real target of the Amendment was state law claims. If the drafters had intended to insulate states from all private suits, no matter whether based on federal or state law, they would surely have adopted the alternative version of the Amendment introduced by Representative Theodore Sedgwick:

> [N]o state shall be liable to be made a party defendant, in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons, whether a citizen or citizens, or a foreigner or foreigners, or of any body politic or corporate, whether within or without the United States.[44]

That the drafters instead chose a version of the Amendment that closed the federal courts only to citizens of other states and foreigners suggests that their eye was on the diversity clauseCa clause that would extend federal jurisdiction only to suits by those peopleCand not on the [federal] subject matter clause, which could be invoked by anyone.[45]

After Chief Justice Marshall=s pronouncement, the Court waited seventy-seven years before revisiting the meaning of the Eleventh Amendment. But when it finally did, in 1890, in *Hans v. Louisiana,*[46] it sang a new tune. *Hans* was an unfortunate test case of the meaning of the Amendment. Like *Chisholm,* it was a suit to enforce obligations on a state war bond, this time issued during the Civil War. But unlike *Chisholm*, the claim was now cast as a federal law claimCplaintiffs claimed that in reneging on its bonds Louisiana was violating the federal Constitution=s command that states not impair the obligations of contracts.[47] Plaintiffs invoked the *subject matter* jurisdiction of the federal courts to advance this *federal* claim.[48] The *Hans* Court, with its eye on the underlying problem that led to the adoption of the Eleventh Amendment, was not about to permit legal creativityCthe refashioning of the debt claim as federal rather than stateCto undo the protection against state war debts that had animated the Amendment=s adoption. Hence, the Court ruled that the Eleventh Amendment must apply to federal causes of action, just as it does to state law actions.[49] Chief Justice Marshall=s perorations to the contrary were acknowledged, but dismissed as a rare off-day for that great man.[50]

---

44 Semiole Tribe v. Florida, 517 U.S. 44, 111 (1996) (Souter, J., dissenting) (quoting GAZETTE OF THE UNITED STATES, Feb. 20, 1973, at 303) (alteration in original).

45 Indeed, to jump ahead of the story, even the current majority on the Court has acknowledged that Athe text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts.@ *Seminole Tribe,* 517 U.S. at 54. As will be shown, this has not deterred the Court from using the Amendment to restrict the federal question jurisdiction as well.

46 134 U.S. 1 (1890).

47 *Id.* at 1B3.

48 *Id.* at 9B10.

49 The Court overcame the peculiar wording of the Eleventh Amendment, which would not have barred federal law suits by in-staters,

by observing that the Eleventh Amendment was intended to reinstate the original, Acorrect@ meaning of Article III of the Constitution, which had been misconstrued in *Chisholm*. *Hans,* 134 U.S. at 11. Article III was never intended to permit suits of any type against States. This conception was reinstated by the Eleventh Amendment, and so Article III itself, if not the literal wording of the Eleventh Amendment, is now to be construed as barring federal jurisdiction over federal law suits against states by their own citizens. *See id.* In **the modern cases described in text,**, this roundabout formulation has been collapsed, as the Court has been talking about the Eleventh Amendment as the source of the ban on federal subject matter **jurisdiction.**

50 *Hans,* 134 U.S. at 20.

After *Hans,* the Eleventh Amendment lay dormant again, for another eighty-six years, until Title VII of the Civil Rights Act of 1964, as amended in 1972, was challenged for authorizing private suits against states that engage in employment discrimination based on race, religion, national origin, or sex. In *Fitzpatrick v. Bitzer,*[51] the Court sidestepped the broader issue by holding that, whatever the Eleventh Amendment=s significance for legislation enacted pursuant to provisions of the Constitution that pre-dated its adoption, the Eleventh Amendment did not apply to statutes enacted to implement the later-enacted Fourteenth Amendment. The Fourteenth Amendment imposed legal constraints directly on states and expressly authorized Congress to enforce the rights created therein, and this empowerment perforce overrode whatever constraints might exist in the Eleventh Amendment.[52] As the state in *Fitzpatrick* did not dispute that Title VII was a proper exercise of Congress=s power to enforce the Fourteenth Amendment, the Eleventh Amendment was inapplicable.[53]

In 1987, the modern Court finally addressed the continued applicability of *Hans* to statutes, which unlike *Fitzpatrick*, were enacted pursuant to congressional powers conferred by provisions of the Constitution that pre-dated the Eleventh Amendment. A bare majority of the *Welch* Court,[54] conceding that the holding in *Hans* was questionable, decided nonetheless to accept that holding as *stare decisis*. The majority explained that whatever its correctness, *Hans*=effects were not Apernicious@ because there existed adequate alternative mechanisms (apart from individual suits against states) for enforcing federal law against states.[55] The other four Justices in *Welch* were prepared to reverse *Hans* outright.[56]

Two years later, in *Union Gas,*[57] the pendulum swung again. The Court now held that Congress has the power, when enacting legislation under Article I of the Constitution, to Aabrogate@ the states= Eleventh Amendment immunity by clearly stating such an intention. This turnabout resulted because one Justice, Byron White, found a loophole by which he could move from the no-federal-suit camp to the other camp without overruling *Hans.*[58] He joined with the four dissenters in *Welch* to declare that ACongress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States.@[59] The distinction wrought by *Union Gas* is this: the mere presence of a federal claim does not empower a plaintiff to invoke the federal courts= subject matter jurisdiction to enforce that claimCthe Eleventh Amendment stands in the way. But if Congress expressly declares that it intends to permit the suit against states despite the Eleventh Amendment, the protection afforded by that Amendment evaporates. In *Hans*, where the plaintiffs had invoked the Aimpairment of contracts@ clause of the Constitution unaided by an express congressional abrogation of the Eleventh Amendment, the Amendment remained a bar. But when a federal statute confers rights and expressly authorizes private suits to enforce them notwithstanding the Eleventh Amendment, as had occurred in *Union Gas*, the Amendment is no longer operative.

---

51 *427 U.S. 445 (1976).*

52 *Id.* at 456B57.

53 *Id.* at 456 n.11.

54 Welch v. Tex. Dep=t of Highways & Pub. Transp., 483 U.S. 468, 478B79 (1987).

55 *Id.* at 487B88. *See infra* Part IV for a discussion of these alternatives. They include, *inter alia,* the right of the federal government to sue states, and the right of individuals to sue state *officials* under the doctrine of *Ex parte Young,* 209 U.S. 123 (1908).

56 *Welch,* 483 U.S. at 519B21.

57 Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

58 *Id.* at 57.

59 *Id.*

This notion that one has a constitutional right, but that Congress can abrogate it, is unique in the Court=s jurisprudence. But it is a testament to how the unfortunate wording and history of the Eleventh AmendmentCcoupled with the desparate need to find a fifth vote to allow private suits against statesChave tortured the Court=s jurisprudence. However convoluted the route, *Union Gas* meant that Congress could enact Commerce Clause legislation conferring rights against states and authorize private-party suits against states to enforce those rights. In a roundabout way, the Supreme Court=s decisional law had evolved to the point where, with a little help from Congress, the Eleventh Amendment would be confined to its originally-intended role of banning federal jurisdiction over *state law* claims against states.

Alas, this convergence with original purpose was short-lived. In 1996, just seven years after *Union Gas,* but after several changes in the Court=s composition, the balance had tilted back 5-4 in the other direction.[60] That bare majority expressly overruled *Union Gas* in *Seminole Tribe*.[61] Acknowledging that the text of the Amendment appears limited to the federal courts= diversity jurisdiction,[62] the majority declared, Awe have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition which it confirms.@[63] That Apresupposition,@ located in *Hans*, Ahas two parts: first, that each State is a sovereign entity in our federal system; and second, that >[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without his consent.=@[64] Neither the *Hans* Court in adopting this presupposition, nor the *Seminole Tribe* Court in embracing it, acknowledged that our Constitution has a Supremacy Clause.

The majority's holding in *Seminole Tribe* garnered stinging dissents from four Justices.[65] Indeed, these four are so contemptuous of the majority=s holding in *Seminole Tribe* that they have refused to accept the holding as *stare decisis* and have declared their intention to dissent whenever the Court strikes down a federal statute on Eleventh Amendment grounds:

> I remain convinced that *Union Gas* was correctly decided and that the decision of five Justices in *Seminole Tribe* to overrule that case was profoundly misguided. Despite my respect for *stare decisis,* I am unwilling to accept *Seminole Tribe* as controlling precedent. . . . [B]y its own repeated overruling of earlier precedent, the majority has itself discounted the importance of *stare decisis* in this area of the law. The kind of judicial activism manifested in cases like *Seminole Tribe* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.[66]

---

60 Justices Brennan, Marshall, Blackmun, and WhiteCfour of the five person majority in *Union Gas*Cwere no longer on the Court. They had been replaced, respectively, by Justices Souter, Thomas, Ginsburg, and Breyer. The critical change was the replacement of Justice Marshall by Justice Thomas. In all other instances, the new Justice shared the predecessor=s support for the holding in *Union Gas*.

61 517 U.S. 44, 66 (1996).

62 *See supra* note **56.**

63 *Seminole Tribe,* 517 U.S. at 54 (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)). This, it bears emphasis, is from the Astrict construction@ wing of the Court.

64 *Id.* (quoting *Hans,* 134 U.S. at 3 (emphasis deleted)).

65 *Id.* at 76B100 (Stevens, J., dissenting); *Id.* at 100B85 (Souter, J., dissenting, joined by Ginsburg & Breyer, JJ.).

66 *Kimel,* 528 U.S. at 65B66 (Stevens, J., dissenting, joined by Souter, Ginsburg, & Breyer JJ.) (citations and footnotes omitted).

The majority in *Seminole Tribe* did acknowledge, however, as the Court had previously held in *Fitzpatrick*, that the Eleventh Amendment does not apply to suits in which states seek to enforce statutes enacted pursuant to Congress=s powers under the Fourteenth and Fifteenth Amendments (the ACivil War Amendments@).[67]

As a result of *Seminole Tribe,* Congress=s invocation of its Commerce Clause power to enact the ADA, even if proper, is not sufficient to sustain the authorization of private suits against states. But the Fourteenth Amendment exception to *Seminole Tribe* would sustain that authorization *if* the ADA is a proper exercise of Congress=s power to enforce the Fourteenth Amendment. That is the question the Court will decide in *Garrett*, and it requires that we shift our focus from the Eleventh Amendment to the Fourteenth.

B. Evolution of the Fourteenth Amendment

[67] *Seminole Tribe,* 517 U.S. at 59. Section Five of the Fourteenth Amendment and Section Two of the Fifteenth Amendment both confer enforcement power on Congress. They are referred to collectively in this paper, as they are repeatedly in the Court=s decisions, as the ACivil War Amendments.@

What is required for a statute to be a proper exercise of Congress=s power to Aenforce@ the Fourteenth Amendment? It seems self-evident that Congress could enact a statute authorizing federal court suits by individuals against states seeking equitable and legal relief for state violations of the Fourteenth Amendment. Such a statute, which would not purport to add to the substantive content of the Fourteenth Amendment, would be the quintessential embodiment of Congress=s constitutional power to enact Aappropriate@ legislation to Aenforce@ the Fourteenth Amendment. Surprisingly, Congress has never enacted such a statute. It has, to be sure, enacted a statute that authorizes suits against Apersons@ who, under color of state law, deprive individuals of their constitutional rights,[68] but the Supreme Court interpreted the word Aperson@ in Section 1983 not to include the states.[69]

If the ADA merely forbade discrimination by states against individuals with disabilities Awhen such discrimination violates the Fourteenth Amendment,@ its congruity with the Section Five power would be obvious. But, of course, the ADA does much more. It forbids a wide swathe of conduct by the statesCe.g., the failure to make reasonable accommodationsCthat likely does not violate the constitution *unless invidiously motivated*.[70] Furthermore, the ADA forbids that conduct *whether or not* it is invidiously motivated. Thus, the ADA forbids even *innocently motivated* refusals of reasonable accommodationCi.e., those that are honestly motivated by a desire not to incur the burden of the accommodation, rather than by a desire to avoid having to employ a person with a disability. The crucial question, therefore, is whether the ADA=s overbreadth exceeds the power conferred upon Congress by the Fourteenth Amendment because it forbids more than the Amendment forbids.

There is no question that some overbreadth is allowed Congress, when it finds a serious pattern of unconstitutional behavior, both to remedy prior violations of the Fourteenth and Fifteenth Amendments and to prevent future violations.[71] That was established in a quartet of decisions issued between 1966 and 1980 upholding provisions of the Voting Rights Act, and has been acknowledged again in a quartet of decisions in the past four years.[72] But, what predicate of unconstitutional behavior (or threat of such behavior) must exist for Congress to resort to overbreadth, and how much overbreadth is

---

68 *See* Civil Action for the Deprivation of Rights, 42 U.S.C. ' 1983 (1994).

69 Will v. Mich. Dep=t of State Police, 491 U.S. 58, 65 (1989). The Supreme Court has repeatedly held that cities, counties, school boards, and other local governmental entities do not enjoy the State=s Eleventh Amendment immunity, even though their actions are Astate action@ within the meaning of the Fourteenth Amendment. *See, e.g.,* Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 281 (1977). Thus, the private suit authorization in the ADA is not in jeopardy as to these potential defendants, so long as the ADA is a proper exercise of either Congress=s Commerce power or its Fourteenth Amendment power.

70 I say Alikely does not,@ rather than Adoes not,@ because there is some lingering uncertainty as to what level of scrutiny the Court will apply to disability discrimination. *See infra* note _ _ _ _. If distinctions that disadvantage persons with disabilities were subjected to heightened scrutiny, they might violate the Equal Protection Clause even if innocently motivated. But if such distinctions are subject only to rational basis review, as the Court appeared to hold in *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432 (1985), then motivationCinnocent or invidiousCwould be dispositive of whether most distinctions offend Equal Protection.

71 In the discussion that follows, some cases involve Congress=s power under Section Five of the Fourteenth Amendment, and some Congress=s power under Section Two of the Fifteenth Amendment. The two provisions are identically worded, and the Court has treated decisions under either as applicable to **both.**

72 *See infra* notes _ _ _, and the accompanying text.

allowed in addressing that predicate? Answering these questions will determine the fate of the ADA provision challenged in *Garrett*.

To predict those answers, it is necessary to explore in depth the two quartets of decisions, issued in two discrete time periods, in which the Court has mapped the breadth of Congress=s enforcement power under Section Five of the Fourteenth Amendment. The first quartet spans the period 1966 to 1980Ca time when AWarren Court@ justices still held the majority on the Court. The second quartet spans the years 1997 to 2000 and is the product of the current Court whose membership has remained constant throughout this period.

1. *Quartet #1: The Foundational Decisions Articulating Congress=s Enforcement Powers*

While I will describe the quartets in chronological order, some advance warning of where the stress-lines between the first and second quartets lie may be helpful. The first quartet should be read with particular attention to three features of the decisions. First, how deferential is the Court to Congress=s finding that there are constitutional violations of such magnitude as to warrant heroic legislative solutions? Second, how deferential is the Court to Congress=s judgment as to what legislative steps are necessary to secure the protections of those Amendments? In this regard, note particularly the Court=s receptivity to Congress=s choice to adopt nationwide provisions. Finally, what Astandard of review@ does the Court adopt in judging the propriety of Congress=s action? Is Congress=s choice to be upheld so long as it is a rational choice, or is Congress held to a higher standard, akin to the Astrict scrutiny@ the Court gives to legislative classifications based on race?

a. South Carolina v. Katzenbach

The first case addressing the scope of Congress=s enforcement powers under the Civil War Amendments was *South Carolina v. Katzenbach,*[73] in which the Supreme Court rejected a challenge by South Carolina to the constitutionality of several provisions of the Voting Rights Act.[74] Most interesting for our purposes is the Court=s disposition of the challenge to Section Four of the Act, which forbade the use of literacy tests as a voter eligibility criterion by Acovered@ states (in other words, states that had a recent history of using such tests in a discriminatory fashion to block blacks from voting).

South Carolina argued that the Court had previously held that literacy tests are not a *per se* violation of the Fifteenth Amendment, even if they have the effect of disqualifying more blacks than whites,[75] yet Section Four forbade the use of facially neutral tests without inquiry into whether they are being discriminatorily administered (indeed, even if it can be proved that they are not). In South Carolina=s view, since the tests were not *prima facie* violations of the Fifteenth Amendment, Congress=s blanket prohibition of themCbanning innocent as well as invidiously motivated testsCwas not an appropriate exercise of its power to enforce that Amendment.[76] More generally, South Carolina argued that the power to enforce the Amendment did not permit overbreadthCi.e., did not permit Congress=s forbidding any practice not itself a violation of the Amendment.

The Court expressly rejected this narrow view of Congress=s power.[77] Even if a test used by South Carolina currently were free of discriminatory purpose, neutral on its face, and administered fairlyCand thus not a violation of the Fifteenth AmendmentCCongress was free to forbid the use of literacy tests to overcome the lingering effects of *past* discrimination.[78] Whites who were illiterate were already registered (due to discriminatory administration of the tests in the past) and even-handed use of tests in the future to determine the eligibility of previously-unregistered voters would Afreeze the effect of past discrimination in favor of unqualified white registrants.@[79] True, an alternative would be to require re-registration of everyone pursuant to a neutral literacy test, but ACongress permissibly rejected [this]

---

73 383 U.S. 301 (1966).

74 Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. ' ' 1971, 1973B1973bb-1 (1994)).

75 Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1959).

76 South Carolina v. Katzenbach, 383 U.S. 301, 333 (1966).

77 *Id.* at 327.

78 *Id.* at 333B34.

79 *Id.* at 334. This same analysis produced a like result in *Gaston County v. United States,* 395 U.S. 285, 297 (1969).

alternative . . . believing that this would be too harsh on many whites who had enjoyed the franchise for their entire adult lives.@[80]

More important than the precise holding in *South Carolina v. Katzenbach* was the Court=s vision of the general scope of Congress=s powers to enforce the Civil War Amendments. The Court declared:

> The language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to *one fundamental principle. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.*[81]

The Court was emphatic that the Civil War Amendments represented enlargement of Congress=s powers, relative to both the states and the federal courts:

---

80 *South Carolina v. Katzenbach,* 383 U.S. at 334.

81 *Id.* at 324 (emphasis added).

> [T]he Framers indicated that Congress was to be chiefly responsible for implementing the rights created in [the Amendment]. AIt is the power of Congress which has been enlarged. Congress is authorized to *enforce* the provisions by appropriate legislation. . . .@ Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition . . .[82]

The Court declared that the test to be applied in determining the scope of Congress=s power under the Civil War Amendments Ais the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States.@[83] The Court declared that the Aclassic formulation@ of that test, laid down by Chief Justice Marshall fifty years before the Civil War in *McCulloch v. Maryland,*[84] applies here as well, and it quoted that formulation: A[l]et the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate, which are plainly adapted to that end,* which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.@[85]

This principle, the Court explained, was Aechoed@ in the early decisions articulating Congress=s powers under the Civil Rights Amendments:

> Whatever legislation is appropriate, that is, *adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain,* and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[86]

Finally, the Court quoted yet another famous Marshall chestnut, this one from *Gibbons v. Ogden,*[87] and declared it applicable to Congress=s powers under the Civil Rights Amendments: AThis power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.@[88]

b. Katzenbach v. Morgan

---

82 *Id.* at 326 (quoting *Ex parte* Virginia, 100 U.S. 339, 345 (1879)).

83 *Id.*

84 17 U.S. (4 Wheat.) 316 (1819).

85 South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 421) (emphasis added).

86 *Id.* at 327 (quoting *Ex parte* Virginia, 100 U.S. at 345B46 (emphasis added)). The Court noted that this language was employed again fifty years later with respect to conferral of similar power upon Congress in the Eighteenth Amendment. *Id.* (citing James Everard=s Breweries v. Day, 265 U.S. 545, 558B59 (1924)).

87 22 U.S. (9 Wheat.) 1 (1824).

88 South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) at 196).

The Court=s second opinion in this quartet, *Katzenbach v. Morgan,*[89] is perhaps the most interesting, as it represents the broadest application of the principles declared in *South Carolina v. Katzenbach* (all of which were reiterated).[90] At issue was the validity of Section 4(e) of the Voting Rights Act,[91] which forbade states= conditioning a person=s eligibility to vote in federal, state, and/or local elections upon the ability to Aread, write, understand, or interpret any matter in the English language@ if the person had completed at least the sixth grade in a school in the United States (including Puerto Rico) Ain which the predominant classroom language was other than English.@[92] This provision had been inserted into the bill at the behest of representatives and Senators from New York, and its purpose was to enfranchise those who had migrated from Puerto Rico to New York City.[93]

Section 4(e) was challenged as exceeding Congress=s powers under the Fourteenth Amendment, because (1) an English-language requirement was not itself a violation of the Fourteenth Amendment, and (2) there was no antecedent constitutional violation for which enfranchising non-English-speaking Puerto Ricans could be a remedy.[94] The Court rejected this argument proffering two independent reasons, each sufficient in its own right, why Section 4(e) Ais . . . appropriate legislation to enforce the Equal Protection Clause.@[95]

The first reason assumed the correctness of the challengers= contention that there was no antecedent constitutional violation. Even on that assumption, the Court concluded that enfranchising Puerto Ricans would increase their leverage within the political structure, and thereby reduce the prospect that they would suffer unconstitutional discrimination in the provision of governmental services generally:

> [Section] 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government Cboth in the imposition of voting qualifications *and the provision or administration of government services, such as public schools, public housing and law enforcement.*
>
> *. . .* The practical effect of ' 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community. Congress has thus prohibited the State from denying to that community *the right that is Apreservative of all rights. This enhanced political power will be helpful in gaining nondiscriminatory treatment in public services for the entire Puerto Rican community. Section 4(e) thereby enables the Puerto Rican minority better to obtain Aperfect equality of civil rights and the equal protection of the laws.@*[96]

Katzenbach v. Morgan thus establishes that Congress=s power to enforce the Fourteenth Amendment embraces quite generalized steps, taken without proof of past discrimination, simply because they are likely to reduce the danger of equal protection violations in the future.

In addition, the Court was emphatic that it was not the proper role of the judiciary to second-guess Congress=s assessment that such instrumental prophylactic steps are appropriate. The Court noted:

> It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. *It was for Congress, as the branch that made this judgment, to assess and weight the various conflicting considerations Cthe risk of pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement . . . . It is not for us to review the congressional resolution of these factors. It is enough that we are able to perceive a basis upon which the Congress might resolve the conflict as it did.*[97]

---

89 384 U.S. 641 (1966).

90 *Id.* at 648B51.

91 42 U.S.C. ' 1973b(e) (1994).

92 Katzenbach v. Morgan, 384 U.S. 641, 643 n.1 (1966).

93 *Id.* at 644.

94 *Id.* at 648.

95 *Id.* at 650.

96 *Id.* at 652B53 (citations and footnotes omitted) (emphasis added).

97 *Id.* at 653 (emphasis added).

The Court then turned to its second, independent rationale for upholding Section 4(e); namely, that Congress might harbor legitimate concern that the English-literacy requirement was in fact badly motivated and thus violative of the Fourteenth Amendment. The mere existence of an objective basis for concern sufficed to entitle Congress to eliminate the possibility by banning the practice:

> The result is no different if we confine our inquiry to the question whether ' 4(e) was merely legislation aimed at the elimination of an invidious discrimination in establishing voter qualifications. We are told that New York=s English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language and in order to assure the intelligent exercise of the franchise. Yet Congress might well have questioned, in light of the many exemptions provided, and evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these were actually the interests being served. Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise. . . . Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York=s English literacy requirement . . . constituted an invidious discrimination in violation of the Equal Protection Clause.[98]

The breadth and significance of the holdings in *Katzenbach v. Morgan* are highlighted by the observations of the two dissenting Justices, Harlan and Stewart.[99] They first concluded that, in applying traditional judicial standards, the New York English literacy requirement did not violate the Equal Protection Clause. They decried the Court=s allowance to Congress of a power to invalidate based only on a rational suspicion that the state law *might* be invidiously motivated.[100] They then addressed whether Congress might annul section 4(e) despite its constitutionality (the first rationale used by the Court). In their view, the absence of a Alegislative record supporting@ the @hypothesized discrimination@ in other areas of public service precluded the prophylactic rationale the majority had embraced.[101]

c. Oregon v. Mitchell

In *Oregon v. Mitchell,*[102] the Court unanimously upheld a 1970 amendment to the Voting Rights Act that extended the ban on literacy tests to the entire country for five years (the ban had previously been applicable only to seven states).[103] But, by a 5-4 decision, the Court struck down Congress=s effort to require states to lower their voting age to eighteen for

---

98 *Id.* at 654B56 (citation and footnotes omitted). The Court went on to ask whether Section 4(e) itself violated any other provision of the Constitution and, after concluding that it did not, declared Section 4(e) an appropriate exercise of Congress=s Fourteenth Amendment power. *Id.* at 656B658.

99 *Id.* at 659B71.

100 *Id.* at 664B66.

101 *Id.* at 666B67. The dissent also characterized the majority opinion as redefining the substantive content of the Fourteenth Amendment, *id.* at 668,Ca charge that is not consistent with the text of the majority opinion, but which Astuck@ as an arguing point until rejected by the modern Court. *See generally* City of Boerne v. Flores, 521 U.S. 507, 530 (1997).

102 400 U.S. 112 (1970).

103 Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).

state and local elections.[104] There was no majority opinion for the Court, but the several opinions shed light on the breadth of the power conferred on Congress to enforce the Fourteenth Amendment.

[104] *Id.* at 118. The Court made two other holdings in *Oregon v. Mitchell* that are not relevant to the issues in this paper. First, Congress was within its power in reducing residency requirements for state and local elections, as state bans violated the right to travel interstate; and second, Congress appropriately exercised its powers respecting eligibility for federal office in lowering the voting age to 18 for federal elections. *Id.* at 118B24.

The five votes denying Congress the power to lower the voting age in state elections noted that those individuals 18B20 were not a discrete and insular majority and Congress had made no findings suggesting they were victims of, or vulnerable to, constitutional violations.[105] The several opinions that collectively upheld the extension of the literacy ban to the entire nationCin the face of Arizona=s contention that there was no justification for concluding that Arizona=s literacy test had ever been used to violate the ConstitutionCoffered illuminating insights on the Justices= understanding of Congress=s power.

Justice Stewart, whose opinion was joined by Chief Justice Burger and Justice Blackmun, began by noting that whether or not the problem existed in all states, Congress had fairly concluded that there were serious problems in at least some states.[106] Without ever questioning Arizona=s claim that there was no problem *in Arizona* warranting an exercise of Congress=s power, this opinion declared that a nationwide ban nonetheless was an appropriate exercise of congressional power:

> Congress has now undertaken to extend the ban on literacy tests to the whole Nation. I see no constitutional impediment to its doing so. Nationwide application reduces the danger that federal intervention will be perceived as unreasonable discrimination against particular States or particular regions of the country. This in turn increases the likelihood of voluntary compliance with the letter and spirit of federal law. Nationwide application facilitates the free movement of citizens from one State to another, since it eliminates the prospect that a change in residence will mean the loss of a federally protected right. Nationwide application avoids the often difficult task of drawing a line between those States where a problem is pressing enough to warrant federal intervention and those where it is not. Such a line may well appear discriminatory to those who think themselves on the wrong side of it. Moreover the application of the line to particular States can entail a substantial burden on administrative and judicial machinery and a diversion of enforcement resources. Finally, nationwide application may be reasonably thought appropriate when Congress acts against an evil such as racial discrimination which in varying degrees manifests itself in every part of the country. A remedy for racial discrimination which applies in all the States underlines an awareness that the problem is a national one and reflects a national commitment to its solution. . . .
>
> *Because the justification for extending the ban on literacy tests to the entire Nation need not turn on whether literacy tests unfairly discriminate against Negroes in every State in the Union, Congress was not required to make state-by-state findings . . . . In the interests of uniformity, Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and controversies upon individual records. . . .* Experience gained under [an earlier statute] has now led Congress to conclude that it should go the whole distance. This approach to the problem is *a rational one; consequently it is within the constitutional power of Congress [under the Civil War Amendments].*[107]

Justice Harlan=s opinion took much the same stance:

> Despite the lack of evidence of specific instances of discriminatory application or effect, Congress could have determined that racial prejudice is prevalent throughout the Nation, and that literacy tests unduly lend themselves to discriminatory application, either conscious or unconscious. This danger of violation of [the Civil War Amendments] was sufficient to authorize the exercise of congressional power [thereunder].
>
> *Whether to engage in a more particularized inquiry into the extent and effects of discrimination, either as a condition precedent or as a condition subsequent to suspension of literacy tests, was a choice for Congress to make.* The fact that the suspension is only for five years will require Congress to reevaluate at the close of that period. *While a less sweeping approach in this delicate area might well have been appropriate, the choice which Congress made was within the range of the reasonable.*[108]

---

105 *See, e.g., id.* at 212B13 (Harlan, J., concurring in part and dissenting in part); *id.* at 281 (Stewart, J., concurring in part and dissenting in part).

106 *Id.* at 280B82 (Stewart, J., concurring in part and dissenting in part, joined by Burger, CJ., & Blackmun, J.).

107 *Id.* at 283B84 (Stewart, J., concurring in part and dissenting in part, joined by Burger, CJ., & Blackmun, J.) (citations and footnotes omitted) (emphasis added).

108 *Id.* at 216B17 (Harlan, J., concurring in part and dissenting in part) (footnotes omitted) (emphasis added).

It is striking to recall that, at the time, Justices Stewart and Harlan, the authors of the two opinions just quoted, were the most conservative Justices on the Court with respect to Congress=s powers under the Civil War Amendments (as they were on most issues); indeed, they had dissented in *Katzenbach v. Morgan*.[109] Yet they embraced the view that Congress could nationalize a solution to a problem based on localized evidence of discrimination and had a general sense that the prejudice that fueled that discrimination was more widely shared. And even they agreed that the scope of judicial review of the congressional action was a narrow one: the law must be upheld if Congress was Arational@[110] or Awithin the range of the reasonable.@[111]

Justice Brennan, in an opinion joined by Justices White and Marshall, also championed uniformity. Congress was free to ban literacy tests nationwide, even if Arizona had never discriminated, because such tests would perpetuate the effect of past racial discrimination in education in other states from whence Arizona citizens might have come.[112] The Constitution Awas framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.@[113] This opinion, too, identified the reviewing lens as whether the Court can Aperceive a rational basis for the congressional judgments. . . .@[114]

The remaining two Justices, Black and Douglas, authored opinions relying on what they believed was evidence that there was unconstitutional behavior in all the states.[115]

d. City of Rome v. United States

The last of the initial quartet of decisions defining the scope of Congress=s power under the Fourteenth and Fifteenth AmendmentsCand the first issued by a Court that included any of its present members[116]Cwas *City of Rome v. United States*.[117] The City of Rome wished to change its election rules in a variety of respects, including, *inter alia,* going from regional to Aat large@ election of all city council members and annexing new neighborhoods into the city (and hence its electorate). What stood in the City=s way was the obligation, under the Voting Rights Act, to secure Aclearance@ from the

---

109 384 U.S. 641, 659 (1966).

110 Oregon v. Mitchell, 400 U.S. 112, 284 (1970) (Stewart, J., concurring in part and dissenting in part).

111 *Id.* at 217 (Harlan, J., concurring in part and dissenting in part).

112 *Id.* at 235B36 (Brennan, J., concurring in part and dissenting in part, joined by White & Marshall, JJ.).

113 *Id.* at 233 (Brennan, J., concurring in part and dissenting in part, joined by White & Marshall, JJ.) (quoting Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935)).

114 *Id.* at 231 (Brennan, J., concurring in part and dissenting in part, joined by White & Marshall, JJ.).

115 *See id.* at 117 (opinion written by Black, J.); *id.* at 135 (opinion written by Douglas, J.).

116 Justices Stevens and Rehnquist had joined the Court in the years since *Oregon v. Mitchell,* 400 U.S. 112 (1970).

117 446 U.S. 156 (1980).

Attorney General.[118] The Attorney General refused to clear the proposed changes because, albeit free of discriminatory purpose, they would have a Adiscriminatory impact,@ i.e., the changes might weaken the chances of blacks being elected to city office. The City contended that the federal government was without power to ban innocently motivated election changes simply because of their effect.[119]

The Court rejected the challenge by a 6-3 vote. The Court observed that it had already held that Congress could ban practices not themselves unconstitutional, if they were appropriate to remedy or prevent denials of equal protection.[120] In the area of voting rights, the Southern states had shown themselves ready to use Aunremitting and ingenious@ devices to continue the exclusion of black voters.[121] Congress could Arationally@ conclude that barring practices with discriminatory impact would prevent practices that were infected with a discriminatory purpose eluding detection:

---

118 Georgia and all its cities were subject to the preclearance requirements of Section Four of the Voting Rights Act. 42 U.S.C. ' 1973b (1994).

119 The Court had ruled in *Washington v. Davis,* 426 U.S. 229 (1976), that practices which are innocently motivated do not violate the Equal Protection Clause, even though they have disparate effects.

120 *See* South Carolina v. Katzenbach, 383 U.S 301 (1966).

121 *City of Rome,* 446 U.S. at 174 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)).

> In the present case, we hold that the Act=s ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that ' 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact. We find no reason, then, to disturb Congress= considered judgment that banning electoral changes that have a discriminatory impact is an effective method of preventing States from A>undo[ing] or defeat[ing] the rights recently won= by Negroes.@[122]

Justice Stevens joined this opinion, but Justice Rehnquist dissented. That dissent is important as he is now part of the prevailing majority on the Court. Justice Rehnquist began by noting the lower court finding, ignored in the Court=s opinion, that ARome has not employed any discriminatory barriers to black voter registration in the past 17 years;@ indeed, the city had in recent years been supportive of blacks= efforts to run for elective posts.[123] Additionally, the City had proved, to the district court=s satisfaction, that the proposed changes were not discriminatorily motivated.[124] He thus described the Court=s holding as follows:

> The Court holds today that the city of Rome can constitutionally be compelled to seek congressional approval for most of its governmental changes even though it has not engaged in any discrimination against blacks for at least 17 years. Moreover, the Court also holds that federal approval can be constitutionally denied even after the city has proved that the changes are not purposefully discriminatory.[125]

Justice Rehnquist recognized that Congress has power to go beyond what the judiciary can do to enforce the Civil War Amendments: AIt has never been seriously maintained . . . that Congress can do no more than the judiciary to enforce the Amendments= commands.@[126] ACongress can act remedially to enforce the judicially established substantive prohibitions of the Amendments.@[127] However, Congress cannot redefine the substantive sweep of the Amendment.[128]

> While the Fourteenth and Fifteenth Amendments prohibit only purposeful discrimination, the decisions of this Court have recognized that in some circumstances, congressional prohibition of state or local action which is not purposefully discriminatory may nevertheless be appropriate remedial legislation under the Civil War Amendments.
>
> *Those circumstances, however, are not without judicial limits.*[The Court=s] decisions indicate that congressional prohibition of some conduct which may not itself violate the Constitution is Aappropriate@ legislation Ato enforce@ the Civil War Amendments if that prohibition is *necessary* to remedy prior constitutional violations by the governmental unit, or if *necessary* to effectively prevent purposeful discrimination by a governmental unit.[129]

---

122 *Id.* at 177B78 (quoting Beer v. Unites States, 425 U.S. 130, 140 (1976) (quoting H.R. REP. NO. 91-397, at 8 (1969))) (footnote and citations omitted).

123 *Id.* at 208 (Rehnquist, J., dissenting).

124 *Id.* at 209 (Rehnquist, J., dissenting).

125 *Id.*

126 *Id.* at 210 (Rehnquist, J., dissenting).

127 *Id.*

128 *Id.* at 210B11.

129 *Id.* at 213 (Rehnquist, J., dissenting) (citation omitted) (emphasis added).

The injection of Anecessity@ as a prerequisite to congressional prohibition of otherwise constitutionally permissible conduct marked the distinction between Justice Rehnquist=s view and that adopted by the Court. He agreed that Congress could shift the burden of proof to the states to prove absence of bad purpose, but disagreed that Congress could deny the state the right to act once it had borne that burden:

> [G]iven the difficulties of proving that an electoral change or annexation has been undertaken for the purpose of discriminating against blacks, Congress could properly conclude that as a remedial matter it was necessary to place the burden of proving lack of discriminatory purpose on the localities. But all of this does not support the conclusion that Congress is acting remedially when it continues the presumption of purposeful discrimination even after the locality has disproved that presumption.[130]

Justice Rehnquist conceded that in *South Carolina v. Katzenbach* and *Oregon v. Mitchell* the Court had upheld flat prohibitions on facially neutral conduct (literacy tests) without affording the states an opportunity to prove their innocent motivation. But those cases involved special circumstances: a demonstration of such latent contemporary mischief as to make a flat ban the Aonly@ effective way to Aprevent the occurrence of purposeful discrimination.@[131] No such urgency attended this case, in which the City=s reformed ways were evident. The upshot, Justice Rehnquist concluded, is that what the Court was *really* doing (without admitting it) was to allow Congress power to redefine the substantive content of the Civil War Amendments so as to ban discriminatory effect as well as discriminatory purpose. And, he insisted, the judiciary having interpreted those amendments differently, Congress was without power to disagree.[132]

e. *Lessons of the AFirst Quartet@*

A fair reading of these cases, *en toto*, yields the following principles:

1. Congress=s power to enforce the Fourteenth Amendment allows it to ban conduct that is not itself violative of that Amendment, if the Aoverbreadth@ is Aappropriate@ to assure citizens the full protection of that Amendment.

2. One Aappropriate@ purpose for overbreadth is to prevent badly-motivated state actions that might go unchecked because the bad motive will escape detection. (Three of the Court=s decisions approve this,[133] by upholding statutes that ban practices altogether without inquiry into the purpose animating them in order to ensure that they are not engaged in with undetectable discriminatory purpose.)

3. Another Aappropriate@ purpose, articulated in *Katzenbach v. Morgan,* is more broadly instrumental: to alter the legal landscape in a manner that reduces the chances that states will engage in badly-motivated behavior.[134]

4. In reviewing Congress=s determination that a prohibition is Aappropriate,@ the Court will apply rational-basis review, deferring to Congress=s assessment unless it is irrational.

2. *Quartet #2. The Modern Cases: Is There Retreat?*

After *City of Rome v. United States,* the Court went seventeen years without again addressing the scope of Congress=s enforcement powers under Section Five of the Fourteenth Amendment. During that period, the composition

---

130 *Id.* at 214 (Rehnquist, J., dissenting) (citation omitted).

131 *Id.* at 215B16 (Rehnquist J., dissenting).

132 *Id.* at 219B21 (Rehnquist, J., dissenting).

133 *See* City of Rome v. United States, 446 U.S. 156 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

134 384 U.S. 641 (1966). The Aappropriate@ purpose in this case was ensuring that minorities had a sufficient voice in the political process to protect themselves. *Id.* at 653B55.

of the Court changed radically. When *City of Boerne v. Flores* was decided in 1997,[135] only two Justices remained from the Court that had decided *City of Rome*. Among others, Justices Brennan, Marshall, Blackmun, and White were gone. Justices Scalia, Thomas, O=Connor, and Kennedy—Justices whose views coincide more often with those of Justice Rehnquist, who had been the lone dissenter in *City of Rome*—had joined the Court.

135 521 U.S. 507 (1997).

This newly composed Court has, in the past three years, issued its own quartet of decisions addressing the scope of Congress=s Fourteenth Amendment power. The common wisdom is that these decisions signal a retreat from the broad vision of Congress=s power reflected in the earlier quartet.[136] Is that true? Or is it simply that the laws examined in the second quartet were less appropriate implementers of the Fourteenth Amendment than those in the first quartet? Recall that one congressional statute was struck down even in the early era: Congress=s effort to lower the voting age in state and local elections from twenty-one to eighteen. It was struck down because Congress had no reason to think that eighteen to twenty-year-olds were a group suffering (or threatened with suffering) discrimination violative of the Fourteenth Amendment. So, it was always a staple of the Court=s conception of the Fourteenth Amendment that Congress could not resort to overbreadthCto banning conduct that might be constitutionalCunless there was reason to fear that absent that step a real risk of unconstitutional behavior existed.

Recall also that all four decisions in the first quartet involved a single subject area, voting rights, as to which discrimination against blacks had been virulent for centuries and surely remained prevalent in at least some parts of the country when the statute was enacted. The Court=s willingness to uphold powerful congressional action to confront a pinpointed problem of egregious dimension does not necessarily mean that that Court would have been equally comfortable with across-the-board statutes regulating states from stem to stern, as Title II of the ADA does.[137]

Surely, the *language* of the early quartet is broad enough to suggest that the Court of that era would have upheld the statutes that the Court has confronted in the past three years. But, the Court=s commitment to the breadth of that language was never put to the test.

The current Court has not suggested any doubt about the validity of any of the decisions in the original quartet and indeed has reiterated virtually all of the general principles announced in those earlier cases. Its explanation for striking down the statutes in recent cases has been, invariably, to the effect that Athis statute is different.@ Yet, though the Court has been careful to insist that it is not overruling those earlier cases, it is surely doubtful that the Court as presently constituted would have upheld the statutes in *Katzenbach v. Morgan* or *City of Rome* (from which, recall, Justice Rehnquist dissented). One may wonder whether the Court is paying lip service to the earlier opinions while, as a practical matter, relegating them to the junk pile.[138]

The decision in *Garrett* likely will reveal the Court=s true hand, for, as will be shown in Part III, the case for Fourteenth Amendment grounding of the ADA is stronger than was true of the RFRA, the Patent Remedy Act (PRA), the ADEA, and the VAWA. To gauge that, it is necessary first to examine the quartet of decisions that found these statutes wanting.

a. City of Boerne v. Flores

---

136 *See, e.g.,* Jesse Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court=s 1996B1997 Term,* 19 CARDOZO L. REV. 2259, 2292 (1998); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration,* 99 COLUM. L. REV. 857, 917 (1999); Joanne C. Brant, Seminole Tribe, Flores *and* State Employees: *Reflections on a New Relationship,* 2 EMPLOYMENT RTS. & EMPLOYMENT POL=Y J. 175, 199 **(1998).**

137 42 U.S.C. ' ' 12131B12165 (1994).

138 The four Justices in the current minority have accused the majority of doing precisely that in the Court=s recent rulings assaying Congress=s power under the Commerce Clause. United States v. Morrison, 120 S. Ct. 1740, 1766 (2000) (to be published at 529 U.S. 598 (2000)).

The new era was launched with the Court=s decision in *City of Boerne v. Flores*.[139] The question was whether the RFRA[140] was an appropriate exercise of Congress=s Fourteenth Amendment power. The Court held that it was not.

The RFRA had been enacted by Congress in response to the Court=s holding, in *Employment Division v. Smith,*[141] that the Afree exercise of religion@ clause of the First Amendment, incorporated into the Fourteenth Amendment, does not require states to make exceptions to laws of general applicability to facilitate religious practice.[142] The Oregon law at issue in *Smith* made ingestion of narcotics a crime and recognized no exception for smoking peyote as a religious practice.[143] The plaintiff in *Smith* argued that the state was obliged to permit his religious practice unless it conflicted with a compelling state interest.[144] He relied on prior interpretations of the Free Exercise Clause that appeared to support his position.[145] But a bare majority of the Court in *Smith* ran roughshod over those precedents, announcing a broad new principle that states may enforce neutral laws without making an exception for religious observance, so long as the laws were not enacted *for the purpose of* forbidding religious practice.[146]

Congress reacted promptly by enacting the RFRA, which attempted to reestablish the rule of the prior Supreme Court cases by prohibiting all governments from Asubstantially burdening@ a person=s exercise of religion, even if the burden results from a rule of general applicability, unless the government can demonstrate that the burden A(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.@[147] Its power under the Fourteenth Amendment was Congress=s only predicate for enacting this law.

The Court saw the statute as a congressional attempt to impose Congress=s view of the meaning of the Fourteenth Amendment in preference to the Court=s view. That was an abuse of Congress=s power. The Court is the ultimate interpreter of the Fourteenth Amendment. Once the Court says what the Fourteenth Amendment means, Congress has no power emanating from the Fourteenth Amendment to superimpose a contrary view.[148]

With this established, the Court turned to a consideration of whether the RFRA could be justified as preventing or remedying violations of the Free Exercise Clause as the Court had construed it in *Smith*. The RFRA=s defenders, invoking the decisions of the first quartet, argued that the RFRA was an appropriate mechanism to Aprevent[ ] and remed[y] laws which are enacted with the unconstitutional object of targeting religious beliefs and practices.@[149] The *City of Boerne* Court

---

139 521 U.S. 507 (1997).

140 Religious Freedom Restoration Act of 1993, 42 U.S.C. ' ' 2000bbB2000bb-4 (1994).

141 494 U.S. 872 (1990).

142 *Id.* at 884B85.

143 OR. REV. STAT. ' 475.992(4) (1987).

144 *Smith,* 521 U.S. at 882.

145 *See generally* Hobbie v. Unemployment Appeals Comm=n of Fla., 480 U.S. 136 (1987); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963).

146 *Smith,* 521 U.S. at 882.

147 42 U.S.C. ' 2000bb-1 (1994).

148 *See* City *of Boerne,* 521 U.S. at 519B29.

149 *Id.* at 529 (citation omitted).

acknowledged that ACongress can prohibit laws with discriminatory effects in order to prevent . . . discrimination in violation of the Equal Protection Clause,@[150] but it announced and applied two limits on the use of that prophylactic. The first is the requirement of a serious constitutional problem in need of redress:

> While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.
>
> . . . .

150 *Id.*

> Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.[151]

The RFRA foundered at this first step because the ARFRA=s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.@[152] Indeed, the legislative record reflected Congress=s awareness that deliberate governmental persecution of religion was virtually nonexistent.[153] While the existence of a sufficient predicate for prophylactic legislation does not depend solely Aon the state of the legislative record Congress compiles,@[154] there was no evidence outside that record to the contrary, and ACongress= concern@ in enacting the RFRA Awas with the incidental burdens imposed, not the object or purpose of the legislation.@[155]

The Court then unveiled the second limit on Congress=s resort to prophylactic legislation: that it be proportional and congruent with the constitutional problem.[156] Against a backdrop of little, if any, unconstitutional behavior, the RFRA invalidates all neutral laws and official actions that have a disparate impact, reaches every corner of governmental action, and does so indefinitely as the RFRA has no termination date or termination mechanism.[157] In these respects, the RFRA goes far beyond the one-issue pinpointed statutes that were upheld in the first quartet.[158]

While demolishing the RFRA, the Court repeatedly emphasized the wide latitude Congress enjoys in determining the need for and shape of legislation enforcing the Fourteenth Amendment and also the concomitant broad deference the Court owes Congress in assessing whether the exercise of that power is within constitutional bounds.[159] The innocent reader might have concluded that the result in *City of Boerne* was an isolated occurrence driven by the Court=s perception that Congress=s real goal was to rewrite the substance of the Fourteenth Amendment rather than enforce the less ambitious version recognized by the Court in *Smith*. But stay tuned!

Significantly, no Justice argued that the RFRA was a proper exercise of Congress=s Section Five power if *Smith* correctly defined the reach of the Free Exercise Clause. The three dissenters wished, rather, to re-examine the correctness of *Smith,* for if the proper construction of the Constitution is as declared in the pre-*Smith* decisions, then the RFRA was prohibiting only that which the Fourteenth Amendment already prohibits.[160]

b. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank

---

151 *Id.* at 530, 532 (citations omitted).

152 *Id.* at 530.

153 *Id.* at 530B31.

154 *Id.* at 531.

155 *Id.*

156 *Id.* at 533.

157 *Id.* at 532.

158 *See id.* at 532B33.

159 *Id.* at 517B18, 519B20, 536.

160 *Id.* at 544 (O=Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,*[161] the Court addressed the constitutionality of the provision in the Patent Remedy Act[162] authorizing patent holders to sue states that infringe patents.[163] Congress declared that it was exercising its powers under the Patent Clause,[164] the Commerce Clause,[165] and the Fourteenth Amendment. The majority in this 5-4 decision applied *Seminole Tribe* in holding that the Patent and Commerce Clause predicates for the Act were insufficient to lift the state=s Eleventh Amendment immunity.[166] Inquiry focused, thus, on whether the Act was a proper exercise of Congress=s power to enforce the Fourteenth Amendment.

The patent holders and the Solicitor General argued that the Patent Remedy Act was aimed at securing the Fourteenth Amendment=s protections against deprivations of property without due process of law.[167] The Court expressed some doubt whether patent infringement by states would violate the Fourteenth Amendment,[168] but that was not its basis for holding that the Act was not an appropriate exercise of Congress=s Section Five power. Rather, the Court relied on the paucity of evidence that there was a serious constitutional problem needing correction.

ACongress identified no pattern of patent infringement by the States . . . .@[169] The Court noted that there had been only eight patent infringement suits prosecuted against states in the 110 years between 1880 and 1990. The Patent Remedy Act thus foundered at the first hurdle erected in *City of Boerne*: there was no constitutional problem that needed fixing.

The four dissenters reiterated their stance that the Eleventh Amendment does not preclude Congress=s authorization of private suits to enforce legislation adopted pursuant to Congress=s Article I powers.[170] They also disagreed with the majority=s assessment of whether Congress had identified a constitutional problem sufficient to exercise its Section Five power.[171]

c. Kimel v. Florida Board of Regents

---

161 527 U.S. 627 (1999).

162 35 U.S.C. ' ' 279(h), 296(h) (1994).

163 35 U.S.C. ' ' 271(h), 296(a) (1994).

164 U.S. CONST. art. I, ' 8, cl. 8.

165 *Id.* at cl. 3.

166 *College Savings Bank,* 527 U.S. at 635B36.

167 *Id.* at 636.

168 *Id.* at 639B41.

169 *Id.* at 640.

170 *Id.* at 665 (Stevens, J., dissenting).

171 *Id.* at 655B664.

The Court=s decision in *Kimel v. Florida Board of Regents,*[172] another 5-4 decision, is the most pertinent to the fate of the ADA, as it too involved a statute forbidding employment discrimination, the ADEA.[173] The Court=s opinion, this time authored by Justice O=Connor, contains expansive statements of the scope of Congress=s Section Five power:

> Congress= ' 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress= power Ato enforce@ the Amendment includes authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment=s text.
>
> . . . .

---

172 120 S. Ct. 631 (2000).

173 Age Discrimination in Employment Act of 1967, 29 U.S.C. ' ' 621B634 (1994 and Supp. IV 1998).

> Difficult and intractable problems often require powerful remedies, and we have never held that ' 5 precludes Congress from enacting reasonably prophylactic legislation.[174]

But in the end, these prove to have been just a tease. For despite the overwhelming documentation in the legislative history of the ADEA of the disadvantages encountered by older persons in the workplace, the Court ruled that the ADEA flunked both parts of the two-part test decreed in *City of Boerne*.

Because classifications based on age are subject only to rational-basis review, A[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.@[175] Because Aincreasing age brings with it increasing susceptibility to physical difficulties,@[176] it is rational for employers to prefer younger workers; granted, not all older workers will have increased physical difficulties, but employers have an economic interest in avoiding the Asearch costs@ that would be entailed in making individualized assessments.[177]

It follows that the use of age would violate the Fourteenth Amendment only if motivated by invidious prejudice. But A[o]lder persons . . . unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a >history of purposeful unequal treatment,-@ and the reason why is obvious: everyone hopes to join the club.[178]

This assessment was confirmed by the ADEA-s legislative record. ACongress never identified any pattern of age discrimination by the states, much less any discrimination whatsoever that rose to the level of constitutional violation.@[179] Isolated snippets in the legislative materials would be insufficient in any event to establish that unconstitutional age discrimination had become Aa problem of national import,@ but in truth the *only* evidence in the record was of rational use of age in filling law enforcement and fire-fighting occupationsCa use that does not violate the Fourteenth Amendment.[180] Most significantly, Congress made no findings that states were committing unconstitutional age discrimination.[181]

With the conclusion that there was no constitutional problem respecting age, it followed inevitably that the second hurdleCthat the legislation be congruent and proportional to the problemCcould not be surmounted. The ADEA bans a wide swath of conduct without requiring proof that it is invidiously motivated. Without reason to think that there might be improper motivation underlying that conduct, there is no justification for banning lawful conduct as a prophylactic against nonexistent unconstitutional behavior. AThe appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.@[182]

---

174 *City of Boerne,* 120 S. Ct. at 644, 648.

175 *Id.* at 646.

176 *Id.* (quoting Vance v. Bradley, 440 U.S. 93, 108 (1979)).

177 *Id.* at 645B46. On the basis of this insight, the Court prior to *Kimel* had upheld state-imposed maximum age limits for state judges, foreign service officers, and police officers. *See generally* Gregory v. Ashcroft, 501 U.S. 452 (1991); Vance v. Bradley, 440 U.S. 93 (1979); Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

178 *Kimel,* 120 S. Ct. at 645 (quoting *Murgia,* 427 U.S. at 313 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))).

179 *Id.* at 649.

180 *Id.*

181 *Id.*

182 *Id.* at 648 (quoting City of Boerne v. Flores, 521 U.S. 507, 530 (1997)).

The four dissenters in *Kimel* relied solely on their disagreement about the meaning of the Eleventh Amendment.[183] The ADEA was concededly an appropriate exercise of Congress=s Commerce Clause power,[184] which is sufficient to empower Congress to authorize private suits for its enforcement.[185] Curiously, the dissenters make no reference to the alternative Fourteenth Amendment grounding for the ADEA. Does this signify doubt on their part that the ADEA could pass muster under the Fourteenth Amendment, or simply a desire to emphasize the degree of their hostility to *Seminole Tribe* by championing the Article I provenance for the provision struck down in *Kimel?*[186]

d. United States v. Morrison

In its most recent decision respecting Congress=s Section Five power, *United States v. Morrison,*[187] the Court struck down, again by a 5-4 vote, the provision in the Violence Against Women Act conferring a federal cause of action enabling victims of gender violence to sue the perpetrators for damages.[188] Congress invoked two sources of power for the enactment: its Commerce Clause power, and its Section Five power to enforce the Fourteenth Amendment.

The Court rejected Congress=s reliance on the Commerce Clause, applying the Court=s new calculus for determining the scope of that power, first announced in *United States v. Lopez:* that the Commerce Clause does not authorize Congress=s regulation of noncommercial activity not tied to the crossing of state lines simply because the aggregate of all incidents of that noncommercial conduct have an effect on interstate commerce.[189] This is, of course, another piece of the Court=s present mission to contract the power of the federal government *vis-a-vis* the states, but as it is beyond the scope of this paper, this part of the *Morrison* opinion will not be further described.

Removing the Commerce Clause prop meant that the fate of the civil suit in the VAWA now turned on the Court=s ruling respecting the Fourteenth Amendment. Here, for the first time in the second quartet, the Court acknowledged that Congress had identified a serious problem of unconstitutional state behavior:

> Petitioners= ' 5 argument is founded on an assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence. *This assertion is supported by a voluminous congressional record.* Specifically, Congress received evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions. Congress concluded that these discriminatory stereotypes often result in insufficient investigation and prosecution of gender-

---

183 *See supra*, **n. 77 and text thereat.**

184 The opinion for the Court acknowledged its prior holding that the ADEA is a valid exercise of Congress=s power under the Commerce Clause. *Kimel,* 120 S. Ct. at 635 (citing EEOC v. Wyoming, 460 U.S. 226, 243 (1983)).

185 *Kimel,* 120 S. Ct. at 652 (Stevens, J., dissenting).

186 The only elliptical reference to the Fourteenth Amendment is the inclusion, as one of the reasons for the wrongness of *Seminole Tribe,* that it Aunnecessarily forces the Court to resolve vexing questions of constitutional law respecting Congress= ' 5 authority.@ *Id.* at 653.

187 120 S. Ct. 1740 (2000).

188 42 U.S.C. ' 13981 (1994).

189 United States v. Lopez, 514 U.S. 549 (1995).

> motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence.[190]

But the VAWA foundered at the second hurdle: the Court ruled that it is not a congruent or proportional response to the constitutional problem Congress identified. The problem is discrimination by state actors in processing claims of gender violence. But the solution is not addressed to the state. Instead, it is aimed at the perpetrator of the violence, who is not a state actor and could not have violated the Fourteenth Amendment.[191]

This seems an extremely weak justification for invalidating the VAWA. But it is beyond the scope of this paper, for the challenged provision of the ADA, unlike that in the VAWA, *is* addressed to the state and thus escapes the rationale that led to invalidation in *Morrison.*

190 *Morrison,* 120 S. Ct. at 1755 (emphasis added).

191 *Id.* at 1758.

The decision in *Morrison* drew a dissent from the four expected justices. All would have upheld the challenged provision as a proper exercise of Congress=s Commerce Clause power; these justices reject the incursions on that power that *Lopez* and *Morrison* have created.[192] Two of the four also Adoubt[ed] the Court=s reasoning@ that Fourteenth Amendment legislation cannot be aimed at private parties who have profited from the state=s discrimination.[193]

192 *See id.* at 1764B74 (Souter, J., dissenting).

193 *Id.* at 1778 (Breyer, J., dissenting, joined by Stevens, J.).